

Supreme Court, U. S.

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In The  
**Supreme Court of the United States**

October Term 1977

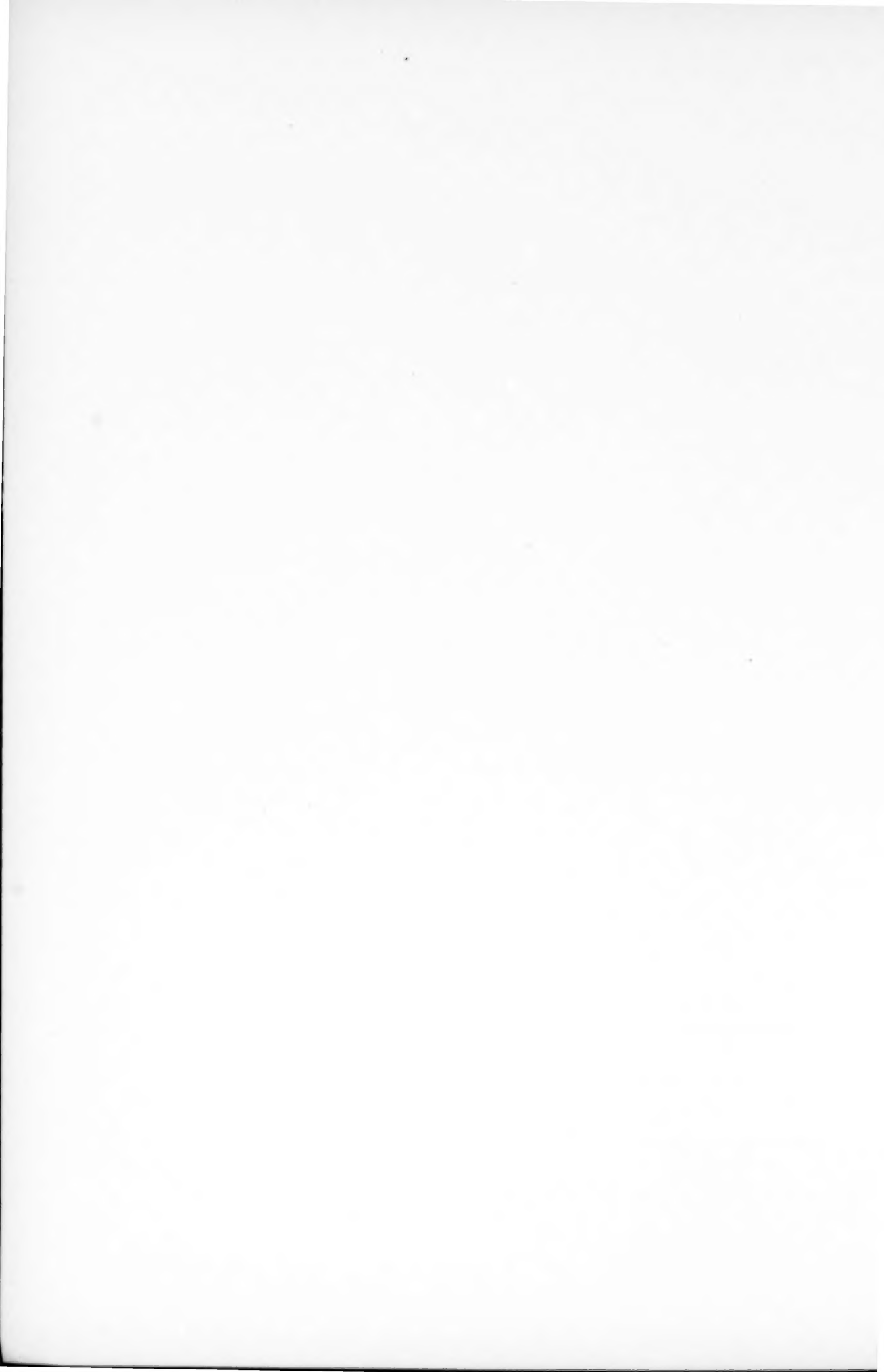
No. 77-165

**JAMES DOUGLAS MCMILLEN,**  
*Petitioner,*  
vs.

**LOUIS J. LEFKOWITZ,**  
Attorney General of the  
State of New York,  
*Respondent.*

SUPPLEMENTAL BRIEF  
ON  
PETITION FOR WRIT OF MANDAMUS  
TO LOUIS J. LEFKOWITZ, ATTORNEY GENERAL  
OF THE STATE OF NEW YORK.

James D. McMillen  
5325 Sanders Road  
Toledo, Ohio 43615  
(419) 385-5108  
Petitioner



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**CONTROVERSY ON JURISDICTION**

It is both crucial and critical to understand that respondent, in challenging jurisdiction of the court to issue this writ of mandamus, camouflages and seeks to conceal the question of a pending criminal trial.

In lengthy discourse, respondent has cited a history of facts relative to civil cases at various stages in appellate procedure. Petitioner originally set forth that the state of any civil cases must be removed from the mind of the court.

Cogently stated, the issue is that the respondent seized in 1975, a large number of petitioner's business records. Since that time, respondent has continued to hold and possess these seized records; allegedly doing so because of pending civil litigation which has already been tried, and is now awaiting appellate review.

Totally independent of these civil matters, the petitioner currently faces a criminal trial on tax matters in Schenectady, New York. The criminal trial on tax charges deals with a period of time concurrent to the records seized admittedly for civil litigation. Possession of petitioner's own personal records is imperative to any possible fair defense at trial.

Jurisdiction for this court to issue a writ of mandamus therefore comes from the emergency need of this court to protect the petitioner's constitutional rights in the criminal trial. The question "looms" before this court to seek an answer to a dilemma:

1. Must McMillen, the petitioner, endure endless postponements of the criminal trial while appellate exercise of civil cases takes place, thus denying him his constitutional right to a speedy trial under the Sixth Amendment to the Constitution, or;

2. Must petitioner McMillen go forward in a criminal trial without a fair defense by access to his records?

It is in the above dilemma that jurisdiction is found. McMillen sought relief from the state courts in New York and was denied. In this action, the respondent shielded himself behind a pending appeal in the U.S. Second Circuit - alleging a defense of "res judicata". Because the defense of res judicata was to the U.S. Second Circuit, McMillen went to the U.S. Second Circuit seeking a writ of mandamus and was denied.

The criminal trial docket indicates the criminal case "should be tried". McMillen needs immediate relief and has exhausted all other reasonable sources. Accordingly, the Supreme Court of the United States must act to preserve the constitutional rights of McMillen in the current criminal trial.

## SUPPORTING CONSIDERATIONS

Initially it is noteworthy to understand that in the criminal tax case awaiting trial in Schenectady, New York, that the prosecution is being handled by "The Attorney General of the State of New York". *RATHER THAN* by the local district attorney. Thus, the prosecutor in the tax case is the same entity as the respondent to this petition for a writ of mandamus.

In reading respondent's brief, the court will note that at no time did the respondent suggest or even "*hint*" that he wished to continue to possess petitioner's records to be used as evidence or assist him in the prosecution of the criminal trial. Rather, he prays permission to continue to hold these seized records "due to pending civil litigation" which admittedly has already passed through trial and is only undergoing appellate review. There is an immediate conclusion which emanates from the above:

1. The seized records have no current, active, value to the Attorney General of the State of New York. He admits he continues to hold them only in fear that an appellate court might overturn an existing verdict (now in his favor), and he might be forced back again to trial.

2. While there is no current active value in the records to the Attorney General of the State of New York, it is apparent that, withholding them from McMillen, harasses him. Again, McMillen is his direct adversary in the forthcoming tax trial. Moreover, it precludes McMillen's opportunity to prepare a fair defense at trial against his adversary.

3. The above is grossly abusive of both justice and McMillen's constitutional rights.

Only remaining then is the shallow assertion of the respondent that he would permit petitioner to see, examine and photocopy petitioner's own records. This is initially greatly misleading inasmuch as many of the items cannot be photocopied. They represent books, cassette tapes, and a variety of items which cannot be copied. Moreover, it should be realized that this petitioner

(defendant in criminal trial) lives and resides in Toledo, Ohio. The materials are located in Albany, New York, and the trial will occur in Schenectady, New York. Preparation for a 42 count grand jury indictment on tax matters involves "far more" than a simple visit to Albany, New York to "see" his own records. Such an idea is totally ridiculous and without merit.

In essence then, the issue and the question solely turns upon the emergency need of the Supreme Court to protect the constitutional rights of McMillen.



## CONCLUSION

For the reasons set forth in the petition and as supplemented in this brief, petitioner respectfully prays that a writ of mandamus be issued out of this honorable Court, directing and commanding the Honorable Louis J. Lefkowitz, Attorney General of the State of New York to forthwith return to petitioner, all records, papers, and documents taken by him on January 17, 1975; and that further, the Court grant to James D. McMillen such other and further relief as may be just in the premises.

Respectfully submitted,

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Dated: September 23, 1977